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IN THE

United States Supreme Court

October, 1997 Term

IVAN D. JONES, JR.,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. Does the Maloney Act of 1938 permit the Securities and Exchange Commission to impose double administrative sanctions upon securities professionals already so punished by the Commission's disciplinary arm, the National Association of Securities Dealers?

2. Does the principle of res judicata permit the Securities and Exchange Commission to bring a separate proceeding against a securities professional after the Commission has countenanced a sanction for the same conduct imposed by its disciplinary arm, the National Association of Securities Dealers ?

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit is published and is reported at 115 F.3d 1173 (4th Cir. 1997). The judgment of the Securities and Exchange Commission has not been reported by either official or unofficial reporters. A copy is reprinted in the following Appendix at A-1.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on June 16, 1997. The Fourth Circuit denied petitioner's timely petition for rehearing and suggestion for rehearing *en banc* on August 12, 1997.

This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254.

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STATEMENT OF THE CASE

Petitioner Ivan D. Jones, Jr. has been a licensed stockbroker for 27 years. He has never had a customer complaint. In 1988, Mr. Jones fulfilled a life-long dream by purchasing his own investment firm. By 1990, Mr. Jones' new business had become so successful that Fortune Magazine cited it as one of the nation's top five money managers for small investors.

In the early 1990s, the National Association of Securities Dealers conducted an audit of Mr. Jones' firm. The audit led to the NASD filing three complaints against Mr. Jones and his firm for alleged violations of various provisions of the Securities Exchange Act, SEC rules and NASD rules. The NASD and Mr. Jones resolved these complaints on October 9, 1992. On that date, the NASD issued, and Mr. Jones agreed to, a sanction that included: (1) a censure; (2) a suspension for three business days; (3) a requirement of requalification as a General Securities Principal; and (4) a fine of $22,500.

Because the NASD's decision was the culmination of an agreement between the NASD and himself, Mr. Jones expressly waived his right to appeal that decision to the SEC pursuant to 15 U.S.C. § 78s(d). Nor did the SEC undertake to review the NASD's decision upon the Commission's "own motion," as was its right under the same statute. Indeed, Mr. Jones understood that, by settling with the NASD, he was resolving the matter permanently:

> Q. Did you have any reason to believe when you filed the responses that the SEC would be filing a complaint against you at that time?

A. As a matter of fact, our attorney said that that would close the case, and we would not hear any further.

[Tr. 1622][1]

Instead, the SEC launched its own investigation. Ultimately, the Commission concluded that Mr. Jones violated section 10(b) of the Exchange Act and SEC Rules 10b-5 and 10b-9, as well as aided and abetted violations of sections 15(b), 15(c) and 17(a) of the Exchange Act, and SEC Rules 15b3-1, Rule 15c2-4, Rule 15c3-1, 17a-3, 17a-5, and 17a-11. (A-9, A-10, A-15, A-22) The SEC also found that Mr. Jones violated section 17(a) of the Securities Act of 1933 and aided and abetted violations of certain provisions of the Advisers Act. (A-9, A-14)

The facts upon which the SEC based its findings were virtually identical with those underlying the NASD proceeding. Indeed, the Commission's decision forthrightly acknowledged that the NASD's sanctions were "based on substantially the same allegations as those in the instant proceeding." (A-23, n. 36)

Although Mr. Jones had already fulfilled the NASD's sanctions, the SEC imposed new, and harsher, penalties: (1) suspending Mr. Jones from any association with a broker-dealer or investment adviser for twelve months, and (2) barring him thereafter from any such association in a

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[1] "Tr. __" refers to the transcript of the evidentiary hearing before an Administrative Law Judge in this matter. That judge's initial decision was appealed to the full Commission, which entered the decision appearing below at A-1.

proprietary, supervisory, or managerial capacity, with a right to apply to become so associated after eighteen months. (A-25, A-26)

Pursuant to 15 U.S.C. § 78y(a)(1), Mr. Jones filed with the United States Court of Appeals for the Fourth Circuit a timely Petition for Review of the SEC's decision. Mr. Jones' petition challenged the SEC's decision on the grounds that the SEC's additional sanctions violated the statutory scheme of regulation Congress devised for the securities markets in the Maloney Act. 15 U.S.C. § 78o-3(a). Mr. Jones' petition also argued that the SEC's actions were barred by the principle of *res judicata* and by the Double Jeopardy Clause.

A panel of the Fourth Circuit denied Mr. Jones' Petition for Review in a written opinion on June 16, 1997 and affirmed the SEC's sanctions. Mr. Jones filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on July 30, 1997. The Court denied that petition on August 12, 1997.

REASONS FOR GRANTING THE WRIT

Mr. Jones' petition presents substantial questions of federal law. The petition seeks review of the SEC's self-professed power to impose additional administrative sanctions on securities professionals already so punished by the NASD -- sanctions which violate the clear terms of the Maloney Act and principles of *res judicata*. Resolution of this question of first impression will have a far ranging impact on the securities markets.

I. JONES' PETITION FOR CERTIORARI PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW REGARDING THE SEC'S ABILITY TO IMPOSE A SECOND PUNISHMENT UPON A BROKER/DEALER ALREADY DISCIPLINED BY THE COMMISSION'S SURROGATE, THE NASD.

A. The Fourth Circuit's Decision to Permit Separate Punishments by the SEC and the NASD for the Same Conduct is Inconsistent with the Maloney Act.

Congress created the SEC to be the primary government agency enforcing the federal securities laws. Four years after passage of the Securities Exchange Act of 1934, Congress amended the Exchange Act to authorize "national securities associations" to enforce those laws under the SEC's supervision. 15 U.S.C. § 78o-3(a). Through this 1938 legislation, known as the "Maloney Act," the NASD was born. See Jones v. SEC, 115 F.3d 1173, 1178-79 (4th Cir. 1997); Harwell v. Growth Programs, Inc., 315 F. Supp. 1184, 1188 (W.D. Tex. 1970), reversed on other grounds, 451 F.2d 240 (5th Cir. 1971), cert. denied, 409 U.S. 876, 93 S. Ct. 126, 34 L. Ed. 2d 129 (1972) (NASD is "effectively a Congressionally-created regulatory organization").

Congress authorized the NASD's creation to avoid "a pronounced expansion of the organization of the Securities and Exchange Commission; the multiplication of branch offices; a large increase in the expenditure of public funds; an increase in the problem of avoiding the evils of bureaucracy; and a minute, detailed, and rigid regulation of business

conduct by law." S. Rep. No. 1455, 75th Cong., 3rd Sess. at 3 (1938); Jones, 115 F.3d at 1178-79. Senator Maloney further explained:

> Congress has undertaken to provide a mechanism whereby the securities business of the country may deal with all problems of technical regulation, leaving to the Securities and Exchange Commission what is hoped will be the residual position of policing the submarginal fringe which recognizes no sanctions save those of the criminal law and of dealing with those problems of regulation with which the industry, as organized under the act, finds itself unsuited or unable to deal.

Report of the Special Study of Securities Markets of the Securities and Exchange Commission, H.R.Doc. No. 93, 88th Cong., 1st Sess., pt. 4, at 606 (1963).

Recognizing the fact that the NASD wields the SEC's disciplinary power, federal courts have identified the NASD as the Commission's disciplinary "agent or arm." Bruan, Gordon & Co. v. Hellmers, 502 F. Supp. 897, 903 (S.D.N.Y. 1980) ("the court is willing to characterize NASD as an agent or arm of the SEC with respect to the conduct of disciplinary proceedings"); Mandelbaum v. NYMEX, 894 F. Supp. 676, 679 (S.D.N.Y. 1995) ("NASD disciplinary officers serve as surrogates for the SEC"); Austin Municipal Securities v. NASD, 757 F.2d 676, 690-91 (5th Cir. 1985) (same). In the words of one federal judge: "As the SEC's 'handmaiden,' [the NASD's action] must be considered a 'valid exercise of the rightful authority of the Government.'" Harwell, 315 F. Supp. at 1191.

The SEC exercises "broad powers of review over virtually every phase" of the NASD's activities:

> The Commission can veto the promulgation of any new rule or amendment to an old rule proposed by the association if the Commission finds the rule inconsistent with the Act, 15 U.S.C. § 78o-3(j)(1964); moreover, the Commission has the power to abrogate any association rule if it finds that abolishing the rule would effectuate the purposes of the Act, 15 U.S.C. § 78o3(k)(1)(1964); and indeed, with respect to some matters, the Commission can effectively command the association to adopt a specific rule, 15 U.S.C. § 78o3(k)(2)(1964). Finally the Commission has plenary review powers over any disciplinary action taken by the association. 15 U.S.C. § 78o3(g)(h)(1964).

Harwell, 315 F. Supp. at 1188; see Jones, 115 F.3d at 1179. Not only are NASD disciplinary decisions directly appealed to the SEC, but the Commission has the power to review them on its "own motion." 15 U.S.C. § 78s(d)(2); Jones, 115 F.3d at 1179.

While the SEC may affirm, modify, reduce, or cancel the NASD's penalty, it may not increase it. "[N]o provision is made for the SEC, on review of an association's disciplinary order, to increase the sanction." Jones, 115 F.3d at 1179; 6 Louis Loss & Joel Seligman, Securities Regulation 2746 n. 220 (3d ed. 1990). Even when the SEC reviews an NASD disciplinary decision on the Commission's own motion, it is

barred from exacerbating the NASD's sanction. 15 U.S.C. § 78s(d) and (e). In the SEC's words: "This Commission is not authorized by statute . . . to increase the sanctions imposed by that body [the NASD]." In re Mason, Moran & Co., 35 S.E.C. 84 n. 25 (1953).

However, the SEC need not accept an NASD sanction the Commission considers overly lenient. The Maloney Act provides that the SEC may reject the sanction and remand the matter to the NASD for further proceedings. 15 U.S.C. § 78s(e). Or, ostensibly, the Commission could set aside the NASD decision, open its own investigation, and impose a different sanction in lieu of the NASD sanction.

Until the Fourth Circuit's decision below, no federal court had ever authorized the SEC to both approve an NASD sanction and impose an additional sanction. In fact, courts had left the issue unresolved:

> It makes no difference that plaintiffs choose to believe the Commission is bent ultimately upon punishing them some more for the misbehavior found by the NASD. The Commission has not announced this objective, and has instituted no proceeding in which further sanctions could be imposed. This is not to say that the Commission is necessarily barred from such a course if it should determine that further adjudicatory proceedings may be justified. It is only to say that it is too early to say.

Thomson & McKinnon v. SEC, 268 F. Supp. 11, 15 (S.D.N.Y. 1967) (refusing to enjoin SEC investigation). The

Fourth Circuit thus recognized that its decision was a case of "first impression." Jones, 115 F.3d at 1177.

The Fourth Circuit's decision has given the SEC powers far beyond its statutory authority. In enacting the Maloney Act, Congress could hardly have contemplated that the SEC would adopt a practice of implicitly approving NASD sanctions and then imposing additional sanctions of its own. That would be more extreme than merely increasing the NASD sanctions -- a procedure flatly prohibited by the Act.

Indeed, the incentive created by the Fourth Circuit's opinion runs directly counter to the purpose of the Maloney Act. Now, no securities professional can ever regard an NASD decision as final. Brokers and dealers sanctioned by the NASD will have little choice but to automatically appeal such decisions to the SEC. The SEC's docket will thus become crowded with cases involving problems of "technical regulation" instead of the "submarginal fringe" envisioned by the Maloney Act. Under the decision below, the Maloney Act, aimed at "avoiding the evils of [expanded SEC] bureaucracy," instead will have added a new, unnecessary, layer.

B. The SEC is Barred by the Principle of Res Judicata from Imposing a Sanction in Addition to that Imposed by the Commission's Delegate, the NASD.

The common law doctrine of res judicata is binding upon two representatives of the federal government. "There is privity between officers of the same government so that a

judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); Kutzik v. Young, 730 F.2d 149, 152 (4th Cir. 1984) ("officers of the same government, who have authority to act on behalf of the government, are in privity").

Therefore, when two federal agencies bring administrative proceedings against the same party, the second agency must accord res judicata effect to the decision of the first. "[T]he reason for applying res judicata to administrative agencies is not only to 'enforce repose' but also to protect a successful party from being vexed with needlessly duplicitous proceedings." Safir v. Gibson, 432 F.2d 137, 143 (2nd Cir.), cert. denied, 400 U.S. 942, 91 S. Ct. 241, 27 L. Ed. 2d 246 (1970). As Judge Friendly explained:

> [I]t would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it. Any objection on the ground that two different statutes are involved is more than overcome in this case by the point that when Congress enacted § 810, the administration of subsidies was entrusted to the same agency, the United States Maritime Commission, that was to enforce the Shipping Act. The 1936 Congress would hardly have expected that after the USMC had found that rates were unjustly discriminatory and unfair while wearing its Shipping Act hat, it would

> reexamine that conclusion on assuming its hat under the Merchant Marine Act, 1936.

Id. Similarly, the 1938 Congress could hardly have expected the SEC to implicitly approve an NASD disciplinary decision while wearing its appellate hat, yet open a separate investigation and impose additional and significantly harsher punishment under its enforcement hat. Indeed, the SEC and NASD's affiliation is even closer than the sibling relationship of the Maritime Administration and the Federal Maritime Commission. See Bruan, Gordon & Co. v. Hellmers, 502 F. Supp. 897, 903 (S.D.N.Y. 1980) (NASD is "an agent or arm of the SEC with respect to the conduct of disciplinary proceedings").

The Fourth Circuit rejected the applicability of *res judicata* on the ground that the NASD and SEC proceedings against Jones were not identical. Jones, 115 F.3d at 1177. That court based its decision on the theory that the two proceedings varied in the degree and type of punishment available.

The Fourth Circuit's reasoning was fallacious -- and its mistake could affect all who operate businesses within the securities markets. Although the punishments that could be meted out by the NASD and the SEC were different, the statutes and regulations allegedly violated were largely identical. Indeed, the Commission's decision forthrightly acknowledged that the NASD's sanctions were "based on substantially the same allegations as those in the instant proceeding." (App-23, n.36)

Moreover, while the precise technical nature of the punishments available to the SEC and the NASD may vary,

their effect is the same. Both entities have the power to impose fines and suspensions -- however they are phrased -- sufficient to shut down a broker/dealer.

Despite the Fourth Circuit's efforts to compare the SEC's double administrative punishment to cases involving criminal and civil remedies, cases involving private parties and the government, or baseball players being fined both by their team and the Commissioner, such analogies are inapposite. Mr. Jones does not assert that the NASD proceeding immunized him against prosecution by the Justice Department, class action civil suits by his customers, or administrative proceedings by state regulators. He merely objects to being administratively punished cumulatively by two wings of a single federal agency. In no other realm of Anglo-American jurisprudence -- save the decision below -- can a person can be held doubly liable, for the same conduct, to the same plaintiff.

The Fourth Circuit's failure to apply the principles of *res judicata* to two proceedings by the same federal agency raises an important issue of federal law.

CONCLUSION

For the forgoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted, this the 10th day of November, 1997.

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 36355 / October 10, 1995

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1530 / October 10, 1995

Admin. Proc. File No. 3-8037

In the Matter of

IVAN D. JONES, JR.
608 Coburn Street
Wrightsville Beach, North Carolina

ROY P. AKERS
1864 Monte Carlo Way
Coral Springs, Florida

OPINION OF THE COMMISSION

BROKER-DEALER AND INVESTMENT ADVISER PROCEEDINGS

Grounds for Remedial Action

Fraud in Sale of Securities and Partnership Interests

Failure to Comply with Net Capital,
Recordkeeping and Reporting Requirements

Where officer of broker-dealer and of investment adviser violated antifraud provisions in connection with offerings of securities and partnership interests, and aided and abetted broker-dealer's violations of net capital provisions, and where officer and president of broker-dealer aided and abetted broker-dealer's violations of recordkeeping and reporting provisions, held, in the public interest to sustain sanctions imposed on officer by administrative law judge, and to suspend president for one year from association with a broker-dealer in a proprietary, supervisory, or managerial capacity and impose a cease and desist order.

APPEARANCES:

John T. Benjamin, Jr., for Ivan D. Jones, Jr.

Peter J. Anderson and Sara Anne Ford, of Sutherland, Asbill & Brennan, for Roy P. Akers.

Joseph L. Grant and Richard P. Murphy, for the Division of Enforcement.

Appeal filed: March 8, 1994
Briefing completed: July 20, 1994
Oral argument: June 14, 1995

I. INTRODUCTION

Ivan D. Jones, Jr. and Roy P. Akers appeal from the initial decision of an administrative law judge. Jones was an officer of both Akers and Jones Securities, Inc. ("AJS" or "the firm"), a registered broker-dealer later known as Jones & Ward Securities, Inc. [1] and Investment/Timing Systems, Inc. ("ITS"), a registered investment adviser. Akers was president of AJS from about April 1989 to June 1990. The law judge found that, during the period April 1989 through April 1990, Jones and Akers violated antifraud provisions in connection with an offering of the securities of Sidbury Land Company, and Jones aided and abetted ITS's violations of Investment Advisers Act ("Advisers Act") antifraud provisions in connection with an offering of general partnership interests in One Virginia Partners ("OVP"). The law judge also found that, during the period from about April 1989 through June 1991, respondents aided and abetted AJS's violations of net capital, recordkeeping, and reporting provisions. [2]

The law judge concluded that Jones should be suspended from any association with a broker-dealer or

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[1] The firm's name was not changed to Jones & Ward until January 1991, after Akers' departure and most of the violative conduct at issue. Accordingly, this opinion will refer to the firm as AJS.

[2] AJS and ITS, both of which were respondents in this proceeding, did not appeal from the law judge's decision. Accordingly, the decision became final as to them. Jones & Ward Securities, Inc., Securities Exchange Act Release No. 33753 (March 10, 1994), 56 SEC Docket 690.

investment adviser for 12 months, and Akers from any association with a broker-dealer for 4 months. He barred respondents from such associations thereafter in a proprietary, supervisory, or managerial capacity, with a right to apply to become so associated after 18 months. In addition, he ordered Jones and Akers to cease and desist from committing or causing any further violations of the provisions they were found to have violated. Our findings are abased on an independent review of the record except to the extent that the findings below are not challenged on appeal.

II. BACKGROUND

Beginning in 1986, Jones conducted an investment advisory business through ITS, a firm that provided a timing service for mutual fund clients and made recommendations of securities and other investments.[3] In 1988, Jones became a one-fourth owner of Trask, Hunt, Hunt, Jones, Ltd. ("THHJ"), a company that was formed to invest in real estate. Jones and his associates decided to acquire a broker-dealer that could market real estate syndications. As a first step, Beacon Investment Group, Inc., a holding company, was formed in January 1989 with Jones as president. Beacon then acquired the stock of Channel Marker Securities, Inc., a registered broker-dealer, from Joseph Daley, and also acquired the stock of ITS. In May 1989, Channel Marker's name was changed to AJS.

In February 1989, Jones informed the National Association of Securities Dealers, Inc. ("NASD") that he

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[3] Jones is president of ITS.

would be the brokerage firm's "control person" who would handle all management responsibilities, and he became the firm's president. Although Jones originally planned to hire Akers just as a salesman, he later decided to have Akers assist him in running the firm.[4] Akers assumed the office of AJS president in April 1989. However, Jones, who became AJS's executive vice president, remained firmly in control of the firm's affairs. Frustrated by his lack of control and being left "out of the loop," Akers resigned as president in July 1990. He was not informed that he had already been removed from office by a vote of the firm's directors, including Jones, in June.[5] Jones then reassumed the office of president.

The plans of Jones and his THHJ associates to market real estate syndications moved forward in March 1989. During that month, THHJ acquired an unimproved tract of land near a major highway, and Sidbury was organized to purchase the property from THHJ with funds to be raised through a securities offering. That same month, THHJ also acquired an office building and adjacent land. In April, OVP was formed to raise the necessary funds to acquire this property from THHJ through the sale of general partnership interests.

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[4] Akers signed a one-year employment contract with Beacon for a specified salary. The agreement provided that, if Akers produced less than 75% of the business specified in the agreement in any given month, Beacon could terminate his employment.

[5] Akers remained with AJS as a salesman until December 1990.

III. THE SIDBURY OFFERING

Beginning in April 1989, AJS was underwriter of an offering, pursuant to Regulation D under the Securities Act, of 38,400 shares of Sidbury common stock at $10.00 per share. The offering circular, drafted by Jones together with attorney Leslie McDaniel, provided that the offering was to be made on a "part-or-none" basis. Unless $192,000 (sales proceeds for half the offering) was raised by August 10, subscribers' funds were to be returned with interest. Sales proceeds were to be escrowed with a named bank until $192,000 was accumulated.

Contrary to the representations in the Sidbury offering circular, Jones opened a checking account for the offering proceeds rather than a bank-controlled escrow account; withdrew some $32,000 from the account before the requisite $192,000 was on deposit; [6] and, instead of refunding subscribers' money, extended the offering beyond the 120-day limit although, because of his withdrawals, $192,000 was not on deposit by the date specified in the offering circular.

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[6] Jones disbursed $9,600 of the funds to AJS for underwriting commissions, $13,460 to THHJ for various fees and expenses incident to the Sidbury offering, and $9,350 to a bank for interest due on the loan THHJ had obtained to purchase the Sidbury property. Although Jones claims that the bank unilaterally withdrew the interest, he admitted at the hearing that it was he who determined the withdrawals that were made from the Sidbury checking account.

Jones does not deny that he took these actions. Instead, he claims that he reasonably relied on the advice of McDaniel. However, McDaniel disputed Jones' claim. According to McDaniel, he advised Jones that the escrow account specified in the offering circular must be a bank-controlled account established pursuant to written agreement;[7] that he never told Jones that he could break escrow when subscription agreements were received for half the offering (as Jones claims), but that $192,000 in cash had to be raised and held in safekeeping; [8] and that, if the necessary funds were not on deposit by the cutoff date, the offering could not be extended. Instead, as McDaniel told Jones, subscribers' money would have to be refunded and Jones would have to"restart from scratch."

In late May 1989, about a month after the Sidbury offering began, it started to get "a little sticky." Accordingly, Jones determined to enhance the offering's attractiveness by giving investors the right to have their shares repurchased at any time by THHJ at the offering price, on 60 days' written notice.[9] The record establishes that the offer was not made

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[7] McDaniel stated that Jones wanted the escrow account since "investors would feel more secure." Although, as Jones points out, Rule 15c-2-4 under the Securities Exchange Act did not require a bank-controlled escrow account for the Sidbury proceeds, such an account was mandated by the Sidbury offering circular.

[8] The record indicates that Jones withdrew Sidbury proceeds even before he had subscription agreements for $192,000 of Sidbury stock.

[9] In addition to letters with a THHJ letterhead, the repurchase offer was made to investors in letters with AJS and ITS

to all investors. Indeed, Jones admitted as much. Moreover, Jones once again ignored McDaniels' advice that, although he could repurchase stock from investors after the offering, there could not be any prior arrangement or guarantee of repurchase.[10] Jones admitted that THHJ did not have enough assets to honor the repurchase agreements. At best, it had an informal line of credit with a bank, and the ability of investors to get refunds depended on whether the bank would lend THHJ the money.[11] No disclosure of THHJ's financial situation was made to investors who were offered the repurchase guarantee.

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letterheads that made no reference to THHJ. Jones insists, however, that THHJ was the intended guarantor.

[10] As our Division of Enforcement contends, sales to persons who were given guarantees against loss were not bona fide transactions for purposes of meeting the Sidbury part-or-none minimum sales requirement. See Securities Exchange Act Release No. 11532 (July 11, 1975), 7 SEC Docket 403-303. However, the law judge made no such finding, and the Division did not appeal his failure to do so. Thus the issue is not properly before us. See Rule 17(b) of our Rules of Practice.

[11] The record does not support Jones' claim that THHJ had a $1 million bank line of credit. Jones seeks to introduce into evidence a THHJ corporate resolution authorizing its officers to obtain bank loans from the United Carolina Bank up to $1,000,000. However, the resolution does not establish that THHJ could actually obtain any such loan. Moreover, Jones has not shown, as required by Rule 21(d) of our Rules of Practice, that there were reasonable grounds for failing to adduce this evidence below. Accordingly, the resolution is excluded from the record.

Jones contends that, since more than $192,000 was received in the Sidbury offering by the August deadline, the part-or-none condition was satisfied even though his earlier withdrawal of funds resulted in less than the requisite amount being on deposit by that date. He further argues that he did not act with scienter since he reasonably relied on the advice of McDaniel, whose testimony to the contrary should not be credited.

One of the primary purposes of a part-or-none offering is to ensure that, by the designated date, the issuer will receive that portion of the total projected offering proceeds deemed essential to enable it to proceed toward its stated objectives.[12] It would hardly accord with that purpose if the part-or-none condition were deemed satisfied although the underwriter had misappropriated all or part of the offering proceeds. We think it clear that Jones acted with scienter. The law judge, who heard the witnesses and observed their demeanor, determined to credit the testimony of McDaniel with respect to the advice he gave Jones. We see no reason to disagree with that assessment. Jones disregarded the terms of the offering circular that he himself helped to draft, and ignored the advice of counsel. Under the circumstances, we conclude that he deliberately defrauded investors in Sidbury.

Accordingly, we find that Jones willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act ("Exchange Act") and Rules 10b-5

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[12] Cf. Svalberg v. SEC, 876 F.2d 181, 183 (D.C. Cir. 1989) ("The all-or-nothing provision serves . . . to ensure that the issuing firm has sufficient funds to complete its project. . .")

and 10b-9 thereunder.[13] Jones also willfully aided and abetted AJS's violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-4 thereunder, [14] and, by reason of the fact that he offered and sold Sidbury stock to ITS clients on behalf of ITS, willfully aided and abetted ITS's violations of Sections 206(1) and 206(2) of the Advisers Act.[15]

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[13] Rule 10b-9 prohibits representations that a security is being offered on a part-or-none basis unless the offering is made on condition that the consideration paid will be promptly refunded unless the total amount due the seller is received by the seller by the specified date.

[14] Contrary to Jones's contention, the fact that Rule 15c2-4 does not require a formal escrow account did not relieve him of liability. Rule 15c2-4 makes it a fraudulent practice for a broker-dealer participating in a part-or-none distribution to withdraw investors' funds before the stated contingency has occurred.

[15] The law judge also found that Akers violated the above antifraud provisions (except those of the Advisors Act) in connection with the fraud on Sidbury investors. However, although the law judge explicitly found that Jones acted with scienter, he made no such finding with respect to Akers. On the contrary, he cited Akers' "negligent" participation in the Sidbury fraud. Since a finding of scienter is necessary to establish violations of several of the provisions at issue, and our staff did not appeal from the initial decision, the findings that Akers violated those provisions cannot stand. As for the remaining findings of fraud against Akers, based on our review of the record we are unable to conclude that they are warranted. Akers had only a peripheral involvement in the Sidbury offering. He was not a party to Jones's fraudulent

IV. THE OVP OFFERING

In April 1989, ITS began offering investors general partnership interests in OVP. Seven partnership interests were offered at $70,000 each. The partnership agreement, which was utilized as a selling tool, and other offering materials specified that OVP's purpose was to acquire and manage the office building referred to above from THHJ and, if practical, to acquire property adjacent thereto. The agreement further specified that, apart from normal daily operations, all partnership actions required the consent of 2/3 of the partners, and that investors' funds received prior to April 28, 1989, would be held in escrow.

Jones did not set up the escrow account required by the OVP partnership agreement. And, although that agreement and other offering materials made it clear that the offering's sole purpose was raising funds to acquire a specific office building, Jones diverted OVP offering proceeds for other purposes. Thus he loaned $25,000 of OVP proceeds to THHJ to enable it to purchase an option on a real estate development known as Parkshore Estates. He loaned an additional $20,000 of OVP's money to AJS. Contrary to Jones's assertions, he did not obtain the required consent of 2/3 of OVP's partners for any of these actions.

Jones argues that the OVP partnership interests were not securities and, therefore, not subject to the securities laws. He further asserts that, in any event, the OVP

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actions, and Jones did not keep him informed of what Jones was doing.

partnership agreement authorized other real estate investments in addition to the specified office building.

The charges with respect to OVP involve alleged violations of only Advisers Act antifraud provisions.[16] Those provisions cover all fraudulent conduct by investment advisers affecting clients or prospective clients whether or not that conduct involves securities.[17] Jones' construction of the partnership agreement is clearly erroneous. He points to the agreement's preamble which recites that "the parties hereto desire to acquire and operate real property." However the body of the agreement makes it abundantly clear that the property referred to is the office building to be acquired from THHJ. We note, moreover, that Jones' diversion of OVP funds did not involve "the acquisition and operation of real property."

Jones further contends that the did not act with scienter since he relied on counsel Robert Singer, who assertedly told him that he could invest OVP proceeds in other real estate ventures. He also points out that he repaid or arranged for the repayment of monies diverted from OVP, and that OVP's partners subsequently ratified his actions.

Jones' claimed reliance on Singer does not aid him. Although Jones testified that Singer advised him that an escrow account was not necessary for OVP proceeds, Singer denied that he gave Jones any such advice. Moreover, while Singer did state that investing OVP money in something

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[16] Sections 206(1) and 206(2).

[17] See Abrahamson v. Fleschner, 568 F.2d 862, 877 (2d Cir. 1977), cert. denied, 423 U.S. 913 (1978).

other than the specific real estate described in the partnership agreement was probably permissible under "a broad reading" of that document, he told Jones that, nevertheless, it was "a bad idea . . . because the partnership hadn't been formed for that . . . purpose."[18] Once again, Jones chose to disregard the terms of the offering materials and the advice of counsel. We think it clear that he acted with scienter.

The fact that Jones subsequently repaid or arranged for the repayment of monies improperly taken from OVP does not excuse his actions. Nor does the fact that several years later, after that repayment and during the course of the hearings herein, Jones was able to get statements from OVP partners purportedly ratifying his prior actions.[19]

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[18] Even if Singer had given his unqualified approval of Jones' diversion of funds, it would clearly have been unreasonable for Jones to have relied on such advice. See, e.g., Pittsburgh Terminal Corp. v. Baltimore & Ohio Railroad Company, 680 F.2d 933, 942-943 (3rd Cir. 1982), cert denied, 459 U.S. 1056 (1982); Mitchell v. Pidcock, 299 F.2d 281, 287 (5th Cir. 1962). We note that Jones does not claim that Singer advised him that he could dispense with the necessity of obtaining the consent of 2/3 of OVP's partners for his actions.

[19] See Wilshire Discount Securities, Inc., 51 S.E.C. 547, 551 n.15 (1993). The identical written statements that Jones obtained from OVP partners, which were presumably prepared by Jones, do not refer to Jones' diversion of OVP money to AJS. They recite the benefits to OVP that supposedly resulted from Jones' loans to THHJ and Southeastern and the purchase of Sidbury stock, and note that the money diverted for those purposes was repaid.

We conclude that Jones willfully aided and abetted ITS' violations of Sections 206(1) and 206(2) of the Advisers Act.

V. NET CAPITAL VIOLATIONS IN 1989

As of month-end dates from April through July 1989, AJS operated with net capital deficiencies ranging from $4,021 to $10,210. During that period, broker-dealers were generally required to maintain net capital of at least $25,000. An exception to the rule permitted brokers to have minimum net capital of only $5,000 if, among other things, they did not hold customer funds or securities, or owe money or securities to customers.[20] So-called "$5,000 broker-dealers" could participate in a part-or-none offering if the proceeds were held by an independent escrow agent.[21]

AJS was operating as a $5,000 broker-dealer. However, Jones' failure to place the Sidbury offering proceeds with an independent escrow agent caused the firm's required net capital to increase from $5,000 to $25,000, and resulted in the above net capital violations from April through July 1989.

Jones contends that he did not willfully aid and abet the firm's 1989 net capital violations. He asserts that he thought that he had set up a valid Sidbury escrow account, and McDaniels did not advise him to the contrary. He

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[20] Rule 15c3-1(a)(2) under the Exchange Act as then in effect.

[21] Rule 15c3-1(a)(2)(ii)

further asserts that Akers, and not Jones, was responsible for net capital compliance during the period in question.

As set forth above, Jones deliberately ignored counsel's advice that he set up a bank-controlled escrow account for the Sidbury proceeds. Thus, he was clearly responsible for the resulting net capital violations and cannot place the blame on Akers. We accordingly find that Jones willfully aided and abetted AJS's violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder on the indicated dates.[22]

VI. OTHER BACK OFFICE INFRACTIONS

Shortly after Beacon acquired Channel Marker in January 1989, the NASD closed the firm down pending NASD approval of its reopening. Although the firm's records were admittedly in a shambles, Jones falsely represented to the NASD that he had reviewed the books and records and found them accurate and current. On March 15, 1989, based in part on Jones' representation, the NASD permitted the firm to reopen for business.

Neither Jones nor Akers had the requisite experience to run the firm's back office. At the NASD pre-licensing meeting on March 15, 1989, Akers was told that the firm must have a financial and operations principal ("FINOP")[23]

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[22] Since Akers was not aware that Jones had not established a valid Sidbury escrow account, we do not find him responsible for these violations.

[23] The FINOP is responsible for matters within the purview of the firm's back office, including financial reports, net

within 90 days, and he agreed to qualify for that position. However, he never did so. Instead, he sought a waiver of the FINOP requirement. Although the NASD denied that request on July 19, 1989, the firm did not have a FINOP until Jones qualified for that position in June 1991, nearly two years later.

Akers conceded that, when he arrived on the scene, the firm's records were "a disaster." However, AJS commenced operations with a back office consisting of two untrained and inexperienced clerks. The preparation of financial reports and the maintenance of books and records were left to Norman Efting, an outside accountant who visited the firm monthly. Efting had no experience in broker-dealer accounting, and Akers quickly determined that Efting did not know how to prepare trial balances and net capital computations. He told Jones that they had to get someone else. Jones admitted that Efting had no experience in preparing broker-dealer books and records, and Efting himself told Jones that he was "uncomfortable" and "frustrated" doing it. Yet Jones did not replace Efting with someone qualified.

By August 1989, after an all-day meeting at which Akers "attempted to gain control of the areas for which [he] was responsible," Jones took over responsibility for the firm's back office and agreed to qualify as FINOP. However, as noted, he did not do so until June 1991. Akers was

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capital, maintenance of the firm's books and records, and all matters "involving the [firm's] financial and operational management." Part II(2)(b) of Schedule C to the NASD's By-Laws.

relegated to "the marketing effort on the sales side of AJS." Nevertheless, as president, he retained responsibility for back office compliance since it is clear that he never made a reasonable delegation of his authority.[24]

An NASD examination of the firm in December 1989 disclosed that the firm's records were still in such a shambles that the NASD examiner was unable to make an accurate net capital computation. According to the examiner, when he questioned Jones and Akers about the situation, they indicated that they were not responsible since this was not their area of expertise, and told the examiner to speak to Efting about any problems. In early 1990, the firm's auditors performing the firm's 1989 audit confirmed the NASD's findings of multiple problems with AJS's books and records. In fact, the auditors had to create a completely new set of books. They also questioned Efting's competence, and told Jones and Akers that the firm should have a daily, ongoing, computerized recordkeeping system in place, and that AJS required the services of an internal person who had an understanding of accounting. However, when the auditors conducted the firm's 1990 audit in early 1991, they discovered that, despite their prior admonitions, their suggestions had been ignored. The firm's records were still substantially deficient; the firm was operating with a net

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[24] See, e.g., Thomas F. White, 51 S.E.C. 1194, 1197 (1994) ("The president of a corporate broker-dealer is responsible for compliance with all of the requirements imposed on his firm unless and until he reasonably delegates particular functions to another person in that firm, and neither knows nor has reason to know that such person's performance is deficient.")

capital deficiency; and there was little difference between the situation in 1989 and that during 1990.

In January 1991, Jones finally replaced Efting with a certified public accountant, William Formy-Duval, to run the firm's back office. However, Formy-Duval did not qualify as a FINOP until 1992. In June 1991, he told an NASD examiner that the firm's books and records had been in disarray when he joined the firm, and that they "hadn't gotten things worked out yet."

As might be expected from the foregoing, AJS committed numerous violations of recordkeeping and reporting provisions during the relevant period, and additional net capital violations. Respondents do not challenge the law judge's findings with respect to the firm's violations, and those findings are amply supported by the record. Accordingly, we find as follows:

A. Recordkeeping Violations

From April 1989 through March 1991, AJS failed to comply with recordkeeping requirements. The firm did not maintain accurate and current blotters itemizing all purchases, sales, receipts and deliveries of securities, receipts and disbursements of cash, and all other debits and credits.[25] It also did not maintain ledgers or other records reflecting all assets and liabilities, income and expense and capital accounts.[26] In addition, AJS did not set up ledger accounts for Sidbury investors. Nor did it set up appropriate customer

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[25] Rule 17a-3(a)(1) under the Exchange Act.
[26] Rule 17a-3(a)(2).

ledger accounts when in 1990 it began handling mutual fund trades for customers by wire transfer.[27] Moreover, AJS did not maintain copies of confirmations of mutual fund wire transactions,[28] and its monthly trial balances were inaccurate.[29]

B. Reporting Violations

(1) AJS failed to file quarterly financial reports with this Commission for the quarters beginning April 1, 1989 and ending December 31, 1990. In addition, the firm failed to file its 1989 annual financial report, and filed its 1990 report late.[30]

(2) In December 1989, an NASD examiner informed Jones and Akers of the firm's April-July net capital deficiencies, and told them to give the required telegraphic notice to regulatory authorities. Jones and Akers disagreed with the examiner's conclusions and refused to accede to his request. Thus the firm did not give the requisite notice. Nor did it send the required telegraphic notice of the

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[27] Rule 17a-3(a)(3).

[28] Rule 17a-3(a)(8).

[29] Rule 17a-3(a)(11). The law judge found that Jones aided and abetted all of ASJ's recordkeeping violations, and Akers, those from April through July 1989.

[30] Rule 17a-5. The law judge found that Jones aided and abetted the firm's 1989 and 1990 violations, and Akers, those occurring in 1989.

recordkeeping deficiencies of which Jones and Akers were informed at that time.[31]

(3) AJS did not promptly amend its application for broker-dealer registration on file with this Commission (i) when it changed its name from Channel Marker to AJS, Akers became the firm's president, and Jones resigned as president and became vice president; (ii) when Akers resigned as president and Jones reassumed that office, and (iii) when AJS's name was changed to Jones & Ward.[32]

C. Additional Net Capital Violations

As of month-end dates from December 1990 through February 1991, and April through June 1991, AJS operated with net capital deficiencies ranging from $8,125 to $63,747. On March 7, 1991, AJS operated with a $36,058 capital deficiency.[33]

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[31] Rule 17a-11. The law judge found that Jones and Akers aided and abetted these violations. As we previously held (Whiteside & Company, Inc., 49 S.E.C. 963, 965-966 (1988)), and the rule now requires, if a broker-dealer is informed by its designated examining authority or this Commission that it is, or has been, in violation of net capital requirements, the broker-dealer, even if it disagrees, must give the required notice of the deficiency, which notice may state its disagreement and specify the reasons therefor.

[32] Rule 15b3-1 under the Exchange Act. The law judge found that Jones aided and abetted all of these violations, and Akers, those that occurred in 1989.

[33] The law judge found that Jones aided and abetted these violations.

Aside from the failure to give telegraphic notice of AJS's 1989 net capital deficiencies, Akers denies that he aided and abetted any of the firm's violations. He asserts that Jones was responsible for managing AJS on a day-to-day basis, and that he (Akers) had only limited involvement in back office matters.

Jones argues that he did not commit any willful violations of back office provisions, stating that the firm's infractions were unintentional and that he took steps to remedy them. In addition, he seeks to place most of the blame on others. Thus, he faults McDaniel for failing to audit Channel Marker's books, and Daley for turning those records over late and in poor condition. He further claims "mismanagement" on the part of Akers, and faults the NASD for its "burdensome" requests for information. Jones concedes that he was responsible for violations that occurred after Akers' departure as president.

The record shows that both Akers and Jones abdicated their back office responsibilities. Akers was admittedly aware from the outset that the position of president entailed responsibility for the firm's financial operations, recordkeeping, and other back office functions. However, he was not qualified to fulfill that responsibility, did not seek to become so qualified, and soon learned that he would not be allowed to get the assistance he needed. Yet, when thwarted by Jones in his efforts to improve the firm's situation, he did not resign as president. Instead, he surrendered control of the firm's back office and allowed the status quo to continue. That he could not do. Once he accepted the title as president, Akers was required to fulfill

the obligations attached to that office for as long as he occupied the position.[34]

Akers knowingly failed to carry out his responsibilities as president. By his actions, he rendered substantial assistance to violations by the firm of recordkeeping and reporting provisions.

Jones' claim that his actions were not "willful" or intentional does not aid him. It is not necessary that a respondent intend to violate the law in order to find his actions "willful." It is sufficient if a respondent commits the act that constitutes the violation or, if charged with a duty to act, fails to meet his responsibilities.[35] Jones cannot shift the blame for the firm's violations to others. He misrepresented the status of the firm's books and records to the NASD, ignored the recommendations of Akers and the firm's auditors, and, after assuming full control of the firm's back office, disregarded his responsibilities. The reforms he has assertedly instituted after the period at issue cannot cure his prior derelictions.

We find that, during the respective periods and in the manner noted above, Akers and Jones willfully aided and abetted AJS's violations of Sections 15(b) and 17(a) of the Exchange Act and Rules 15b3-1, 17a-3, 17a-5 and 17a-11 thereunder. We further find that, during the period December 1990 through June 1991, Jones willfully aided and abetted AJS's violations of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.

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[34] See Kirk A. Knapp, 50 S.E.C. 858, 864 (1992).

[35] Frank W. Humpherys, 48 S.E.C. 161, [illegible] (1985).

VII. PUBLIC INTEREST

Jones argues that any sanctions against him are unjustified. He asserts that we abused our discretion in bringing this action since no public investors were harmed or complained, there is not present threat of any future harm, and all he ever did was protect and try to make money for his clients. He further states, among other things, that he repaid with interest the money lost on two OVP investments, that he has already been sanctioned by the NASD, [36] that none of his violations was intentional, and that new controls and procedures have been implemented to prevent any recurrence. Finally, Jones claims that he relied on counsel at all relevant times, and has already suffered massive losses as a result of these and related proceedings. Akers argues that his conduct does not justify the four-month total suspension imposed by the law judge, and that he has been punished enough by the sanctions that the NASD assessed for the same violations.[37]

Jones engaged in egregious misconduct. Far from relying on the advice of counsel, he deliberately disregarded

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[36] In October 1992, in proceedings based on substantially the same allegations as those in the instant proceeding, the NASD, pursuant to an offer of settlement, censured Jones, suspended him for 3 business days, required him to requalify as a general securities principal, and fined him $22,500, jointly and severally with the firm. Also pursuant to an offer of settlement, the NASD censured Akers, fined him $5,000 and required him to requalify as a general securities principal.

[37] See n 36, supra

the advice of attorneys, auditors, and regulators to suit his own purposes. Based on the record before us, we consider that, contrary to his assertions, he poses a distinct threat to public investors. Thus we consider the sanctions assessed by the law judge necessary in the public interest. To the extent that Jones raises legitimate mitigative factors, the law judge has already taken them into account.

We have not sustained the law judge's findings of fraud and net capital violations against Akers. However, his failure to fulfill his responsibilities resulted in serious back office infractions. Under all circumstances, we consider that a one-year suspension of Akers from association with a broker-dealer in a proprietary, supervisory or managerial capacity, coupled with an appropriate cease and desist order, will adequately serve the public interest.

As appropriate order will issue.[38]

By the Commission (Chairman LEVITT and Commissioner WALLMAN).

Jonathan G. Katz
Secretary

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[38] All of the arguments advanced by the parties have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 36355 / October 10, 1995

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 1530 / October 10, 1995

Admin. Proc. File No. 3-8037

In the Matter of

IVAN D. JONES, JR.
608 Coburn Street
Wrightsville Beach, North Carolina

ROY P. AKERS
1864 Monte Carlo Way
Coral Springs, Florida

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's opinion issued this day, it is

ORDERED that Ivan D. Jones, Jr. be, and he hereby is, suspended from any association with a broker-dealer or investment adviser for a period of twelve (12) months, and

barred thereafter from any such association in a proprietary, supervisory, or managerial capacity, with a right to apply to become so associated after eighteen (18) months; and it is further

ORDERED that Roy P. Akers be, and he hereby is, suspended from association with a broker or dealer in a proprietary, supervisory, or managerial capacity for a period of one year; and it is further

ORDERED that Jones and Akers cease and desist from committing or causing any further violations of the provisions they were found to have violated; and it is further

ORDERED that the suspensions of Jones and Akers shall be effective at the opening of business on October 18, 1995.

By the Commission.

Jonathan G. Katz
Secretary

15 U.S.C. § 78o-3(a)
Registered securities associations

(a) Registration; application. An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title [15 USCS § 78s(a)], by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78s(d)

Notice of disciplinary action taken by self-regulatory organization against a member or participant; review of action by appropriate regulatory agency; procedure.

(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory

agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appropriate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

15 U.S.C. § 78s(e)

(e) Disposition of review; cancellation, reduction, or remission of sanction.

(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)--

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this title, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this title, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

Supreme Court, U.S.
FILED
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United States Supreme Court

October 1997 Term

IVAN D. JONES, JR.,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IVAN D. JONES, JR.,
Petitioner,

v. No. 95-3119

SECURITIES & EXCHANGE COMMISSION,
Respondent.

On Petition for Review of an Order of the Securities & Exchange Commission. (No. 308037)

Argued: January 29, 1997

Decided: June 16, 1997

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Murnaghan and Judge Motz joined.

COUNSEL

ARGUED: Jonathan Drew Sasser, MOORE & VAN ALLEN, P.L.L.C., Raleigh, North Carolina, for Petitioner. Susan Ferris Wyderko, Senior Litigation Counsel, SECURITIES & EXCHANGE COMMISSION, Washington, D.C., for Respondent.ON BRIEF: Jeffrey M. Young, MOORE & VAN ALLEN, P.L.L.C., Raleigh, North Carolina, for Petitioner. Paul Gonson, Solicitor, Richard H. Walker, General Counsel, Eric Summergrad, Principal Assistant General Counsel, Catherine A. Broderick, Counsel to the Assistant General Counsel, SECURITIES & EXCHANGE COMMISSION, Washington, D.C., for Respondent.

OPINION

NIEMEYER, Circuit Judge:

Ivan D. Jones, Jr., a stockbroker, was censured, suspended briefly, and fined in October 1992 by the National Association of Securities Dealers ("NASD") for illegal conduct in connection with two private offerings and various "back room" violations. Approximately six months later, the Securities and Exchange Commission ("SEC") instituted a broader administrative proceeding against Jones arising out of the same conduct. Finding that Jones violated various antifraud, recordkeeping, and reporting provisions of the Securities Act of 1933, the Securities and Exchange Act of 1934 ("Exchange Act"), and the Investment Advisers Act of 1940 ("Advisers Act"), the SEC suspended Jones from

association with a broker-dealer or investment advisor for 12 months and thereafter from association in a proprietary, supervisory or managerial capacity with a right to reapply for such association after 18 months.

Petitioning for review of the SEC's order, Jones contends that the NASD's prior disciplinary action precludes the SEC from bringing this proceeding because to do so violated (1) principles of res judicata; (2) the Maloney Act of 1938, 15 U.S.C. § 78o-3; and (3) the Fifth Amendment's Double Jeopardy Clause. He also challenges the sufficiency of the evidence to support the SEC's order and the reasonableness of his 30-month suspension, contending it was "unduly harsh." For the reasons that follow, we affirm.

I

Jones became a stockbroker in 1968, and in 1989 he became an officer and director of Jones & Ward Securities, Inc. (previously Akers and Jones Securities, Inc.) (hereafter "Jones & Ward Securities"), a registered broker-dealer. Jones informed the NASD that he would be Jones & Ward Securities' "control person" who would handle all important responsibilities. A few years earlier he had also become an officer and director of Investment/Timing Systems, Inc. ("ITS"), a registered investment advisor.

In March 1989, Trask, Hunt, Hunt, Jones, Ltd. ("THHJ"), a corporation formed to invest in real estate, acquired an unimproved tract of land and an adjacent office building in Wilmington, North Carolina. Three of the THHJ owners, including Jones, formed Sidbury Land Company to raise money for the purchase of the unimproved THHJ tract by offering common stock to investors through a private

placement ("Sidbury Offering"). The owners of THHJ likewise formed One Virginia Partners to raise money for the purchase of the adjacent office building by offering general partnership interests ("OVP Offering").

In April 1989, Jones and his attorney, L. Bruce McDaniel, drafted a circular for the Sidbury Offering, with Jones & Woods Securities acting as underwriter, to sell 38,400 shares of common stock at $10 per share. The shares were to be sold 1,200-share units to not more than 32 purchasers with a fifty percent "part or none" proviso; if less than $192,000 were raised by August 10, 1989, investors would be refunded their money with interest. The circular provided that "the first $192,000 of sales proceeds will be escrowed with United Carolina Bank of Wilmington, North Carolina. After $192,000 in stock has been sold, those escrowed funds will be released to the Company." Investors were instructed to forward their subscription payment to "Sidbury Land Company Escrow Account."

Jones' attorney, McDaniel, later testified that he explained to Jones that the escrow account referred to in the circular would have to be set up so that the bank held the investors' money beyond Jones' control. He testified that he had explained to Jones that Jones should establish a "true escrow," an arrangement he described as requiring that "the bank hold[ ] money in trust, and [that] they cannot release it except in accordance with terms of the escrow agreement." When McDaniel and Jones had a discussion about who should draft the escrow agreement, Jones assured McDaniel that Jones would take care of it. McDaniel testified later that he also explained to Jones that if the $192,000 were not on deposit by August 10, 1989, the offering could not be

extended. Rather, Jones would be required to refund the subscribers' money and "restart from scratch."

Instead of opening an escrow account beyond Jones' control, as McDaniel had advised, Jones opened a regular checking account labeled "Sidbury Land Co., Inc. Escrow Account" and deposited underwriting proceeds into the account subject to unrestricted withdrawal over his signature. On July 10, 1989, after Jones had agreements for the purchase of $192,000 worth of stock but when the escrow account had only $108,000 in it, Jones withdrew $9,600 from the escrow account to pay Jones & Ward Securities for underwriting commissions and $13,460 to pay THHJ for various fees and expenses incident to the offering. On July 28, 1989, Jones withdrew another $9,350 from the escrow account to pay interest on a loan that THHJ had taken out to finance the purchase of the undeveloped land that it owned. As of August 10, 1989, the last day of the offering, the escrow account did not have $192,000 as specified in the offering circular, although it would have had $192,000 in it had Jones not earlier withdrawn the $32,410 for various expenses. Rather than starting over from scratch, Jones extended the offering period, and ultimately, in March 1991, the Sidbury Land Company did purchase the unimproved property from THHJ.

In late May 1989, about a month after the Sidbury Offering began -- when the offering "started to get a little sticky," as McDaniel stated -- Jones began to offer certain investors, but not all, the right to have their shares repurchased at any time by THHJ at the offering price. Jones explained that he simply wanted to "enhance the offering over and above the private placement memorandum, by offering [some investors] some liquidity." THHJ, however, did not have sufficient assets to

honor the repurchase agreements, although Jones later claimed that THHJ then had a sufficient line of credit with a bank.

Parallel with the Sidbury Offering, One Virginia Partners began the OVP Offering of partnership shares to investment advisory clients of ITS, as well as others, to raise $490,000 to purchase the THHJ-owned office building next to the undeveloped Sidbury Land Company property. The cost of the building was estimated at approximately $425,000. The offering materials used by Jones and ITS indicated that seven partnership interests would be sold at $70,000 each and that funds received from each investor prior to April 28, 1989, would be held in an escrow account. As he did with the Sidbury Offering, Jones opened a regular checking account under his control and deposited the offerings' proceeds into that account. Without the prior consent of the partners, Jones withdrew $25,000 from the One Virginia Partners escrow account and paid it to THHJ to enable it to purchase an option on unrelated real estate known as Parkshore Estates. Similarly, he loaned $20,000 from the escrow account to Southeastern Car Care Center #1, a company that went into bankruptcy soon thereafter. Jones used $60,000 of the One Virginia Partnership escrow funds to purchase 6,000 shares of Sidbury Land Company stock, thereby enabling Sidbury Land Company finally to acquire the unimproved property that was described in its offering circular. Finally, in the fall of 1989, Jones withdrew $20,000 from the One Virginia Partnership escrow account to lend it to Jones & Ward Securities for ongoing operations. About ten months later, Jones & Ward Securities issued a demand note to One Virginia Partnership for the $20,000 that it had borrowed, and later it repaid the loan. Jones personally also made good the loss of the funds invested in the bankrupt car-care center.

During the relevant period, April 1989 to April 1990, the SEC required broker-dealers to maintain net capital of at least $25,000 if they held customer funds or securities or owed money or securities to customers. If they did not hold customer funds or owe customers money, they could operate with a minimum net capital of $5,000. See Exchange Act Rule 15c3-1(a), 17 C.F.R. § 240.15c3-1(a). The same rule provides that a "$5,000 broker-dealer" could participate in a "part or none" offering only if the offering proceeds were held by a independent escrow agent. Throughout the April 1989-April 1990 period and thereafter, Jones & Ward Securities purported to operate as a $5,000 broker-dealer. When Jones failed, however, to place the Sidbury Offering proceeds into an independent escrow account, the firm's net capital requirement increased from $5,000 to $25,000, resulting in capital deficiencies for several months. In December 1989, an examiner from the NASD advised Jones & Ward Securities to report its net capital deficiencies to regulatory authorities as required by Exchange Act Rule 17a-11, 17 C.F.R. § 240.17a-11, but Jones refused to do so. And from December 1990 through February 1991 and from April 1991 through June 1991, Jones & Ward Securities operated with net capital under even the $5,000 requirement. Jones & Ward Securities' records were also inadequate. In order to get approval to open Jones & Ward Securities in 1989, Jones falsely represented to the NASD that his records were accurate and current. Moreover, Jones agreed with the NASD to qualify as a Financial Operations Principal (FINOP) within 90 days, but failed to do so for two years despite NASD's denial of a waiver of the FINOP requirement. From April 1989 through March 1991, although Jones & Ward Securities did maintain some records, the records were neither accurate nor current. The firm did not maintain appropriately itemized blotters and ledgers as well as wire

transfer confirmations, all as required by Exchange Act rules. See, e.g., 17 C.F.R. §§ 240.17a-3(a)(1)-(3), (8), & (11); 240.17a-5; 240.17a-11. Indeed, during their examination in 1989, the NASD examiners could not even determine Jones & Ward Securities' net capital from its records. In 1990, NASD auditors had to create an entirely new set of books to complete the 1989 audit. Jones & Ward Securities also failed to file quarterly financial reports from April 1, 1989, through December 31, 1990; failed to files its 1989 annual report; and failed timely to file its 1990 annual report. The firm also failed to maintain an accurate broker-dealer registration and failed to give the SEC the required telegraphic notice of its net capital and record-keeping problems.

As a result of its 1989 examination of Jones & Ward Securities, the NASD issued a 10-count complaint against Jones, his firm, and another officer of the firm because of their handling of both the Sidbury Offering and the OVP Offering, their failure to maintain adequate capital amounts, and their failure to keep adequate records. Following negotiation with NASD, Jones reached a settlement with the NASD under which the NASD issued a "Decision and Order of Acceptance of Offers of Settlement" dated October 9, 1992. In its Decision and Order, the NASD found that Jones had violated various NASD rules, the Exchange Act , and various rules promulgated under the Act. The NASD district director noted, however, that "no public customers have complained of any harm from their investments with the firm" and that various requests made by the NASD staff had been resolved to the staff's satisfaction. The NASD sanctioned Jones with a censure, a three-day suspension, and a $22,500 fine. It also required Jones to requalify by examination as a "general securities principal."

Several months later, on May 6, 1993, the SEC issued a separate order instituting an administrative proceeding against Jones and others under the Securities Act of 1933, the Exchange Act, and the Advisers Act, alleging antifraud violations, net capital violations, and books and records and reporting violations. In the proceeding, the administrative law judge ("ALJ") found that Jones had violated or aided and abetted violations of antifraud provisions in connection with the Sidbury Offering, that Jones aided and abetted violations of antifraud provisions of the Advisers Act by ITS in connection with the OVP Offering, and that Jones aided and abetted his brokerage firm's violation of net capital, record keeping and reporting requirements. The ALJ suspended Jones from association with any broker or dealer or investment advisor for 12 months and barred Jones thereafter from association with a broker or dealer or investment advisor in a proprietary, supervisory, or managerial capacity with the right to reapply after 18 months. Jones was also censured and enjoined from future violations. Upon its de novo review of the record, the SEC, in an opinion and order dated October 10, 1995, affirmed the sanctions imposed by the ALJ, and this petition for review followed.

II

Jones' principal arguments amount to an overarching contention that once the NASD had sanctioned him for violating its rules and several federal securities laws, the SEC could not also sanction Jones again based on the same conduct. To support this contention, he makes three points: (1) because the SEC has a right to review, modify, and cancel

(but not increase) the NASD's sanction and did not do so, it is now bound by its decision not to do so under principles of res judicata; (2) to permit the SEC to increase the NASD's sanction through a separate proceeding violates the Maloney Act which recognizes the NASD as a quasi-public regulatory body whose sanctions the SEC may not increase, see 15 U.S.C. § 78s(e); and (3) the SEC's sanction is a second penalty for the same conduct that violates the Fifth Amendment's Double Jeopardy Clause. These arguments present issues of first impression, and we discuss them seriatim.

A

Jones begins his first argument with the observation that the NASD is the SEC's "disciplinary agency or arm" and that the SEC has broad oversight over all of the NASD's activities. Indeed, any NASD disciplinary order may be appealed directly to the SEC or the SEC may review such an order on its own motion. See 15 U.S.C. § 78s(d)(2). He concludes, therefore, that "by accepting the NASD decision [in this case] without modification, the SEC implicitly adopted it as its own," and the NASD's decision therefore "became a final SEC decision." Accordingly, Jones concludes, the SEC is bound under principles of res judicata by the NASD's disciplinary order. Alternatively, Jones contends that even if the SEC was not a party to the NASD proceeding, the NASD and the SEC were in privity with each other for purposes of applying res judicata because they are both agencies of the United States government and because the SEC has pervasive supervisory authority over the NASD.

Res judicata bars a cause of action adjudicated between the same parties or their privies in a prior case. See Meekins v.

United Transp. Union, 946F.2d 1054, 1057 (4th Cir. 1991). This is because a personal judgment in favor of a plaintiff extinguishes the plaintiff's claim. See Restatement (Second) of Judgments § 17 (1980); see also id. § 18. To establish a res judicata defense, a party must establish: "(1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." Meekins, 946 F.2d at 1057 (internal quotations and citations omitted).

At the outset, we assume, for purposes of considering Jones' argument, that a prior SEC decision based on the NASD's disciplinary order would have preclusive effect to the same extent as any other agency decision where the agency acts in an adequately judicial capacity. The SEC has not suggested otherwise in this case. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966) (superseded by statute on other grounds); see also Astoria Federal Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991) (noting the presumption in favor of the Utah Constr. & Mining rule, absent contrary congressional intent); University of Tennessee v. Elliott, 478 U.S. 788, 797 (1986) (holding that the factual findings of federal agencies functioning in an appropriately judicial capacity enjoy preclusive effect in federal courts); Restatement (Second) of Judgments § 83 (1980); 2 Kenneth C. Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 13.3, at 248-59 (3d ed. 1994). Thus, while Jones may be able to identify a final judgment on the merits entered by the NASD against him based on his

conduct in connection with the Sidbury and OVP Offerings, he can establish neither the second res judicata requirement that the SEC's subsequent enforcement action is the same cause of action as the NASD's enforcement action nor the third requirement that the SEC and the NASD are in privity with each other for res judicata purposes.

With respect to the second res judicata requirement that the causes of action be identical, the nature of the statutory scheme and the relationships between the parties under it reveal that the NASD's enforcement action is not the same cause of action as the SEC's own later enforcement action. While the Exchange Act's methods for regulating fraudulent and unethical conduct in the over-the-counter securities markets were originally limited to enforcement provisions for registration, inspections, and fraud prosecutions, those large-scale mechanisms were thought to be inadequate "to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry" and inadequate "to cope with those methods of doing business, which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market." S. Rep. No. 75-1455, at 3 (1938); H.R. Rep. No. 75-2307, at 4 (1938). Rather than expand the SEC bureaucracy to enforce the regulation of "financial responsibilities, professional conduct, and technical proficiency," in 1938 Congress elected to expand regulation through the enactment of the Maloney Act, 15 U.S.C. § 78o-3, which mandates industry self-regulation through the creation of registered national securities associations. S. Rep. No. 75-1455, at 3-4; H.R. Rep. No. 75-2307, at 4-5. The intent was to establish a "cooperative

regulation" where such associations would regulate themselves under the supervision of the SEC. Id.

Under the Maloney Act, which amended the Exchange Act, registered securities associations are authorized to adopt rules which the SEC must, with limited exceptions, approve prior to their implementation and which the SEC may abrogate or amend as it deems in the public interest, consistent with the requirements of the Exchange Act. See 15 U.S.C. § 78s. Moreover, such associations must notify the SEC of all final orders disciplining association members. See 15 U.S.C. § 78s(d). A disciplined member may appeal to the SEC, or the SEC may, on its own motion, review final association disciplinary orders. See id. On review, the SEC is authorized to affirm, cancel, reduce or require remission of the NASD's sanction. See 15 U.S.C. § 78s(e). But no provision is made for the SEC, on review of an association's disciplinary order, to increase the sanction.

Following enactment of the Maloney Act, only the NASD, which is a private, nonprofit corporation organized under the laws of Delaware, has registered as a national securities association. See 6 Louis Loss & Joel Seligman, Securities Regulation 2794-95 (3d ed. 1990). In furtherance of its statutorily mandated role, the NASD adopted Rules of Fair Practice implementing its prescription that NASD members "observe high standards of commercial honor and just and equitable principles of trade." NASD Rules of Fair Practice Art. III § 1 (1992) (current version at Conduct Rule 2110, NASD Sec. Dealers Man. (CCH) ¶ 4111 (1996)).

In addition to the Maloney Act's authorization of the NASD to discipline its members, the Exchange Act and the Adviser's Act explicitly authorize the SEC to discipline securities

professionals directly. See 15 U.S.C. § 78o(b)(4) & (6); 15 U.S.C. § 80b-3(e) & (f). We have found no statutory, regulatory, or historical reference to support Jones' argument that NASD discipline of its members was intended to preclude this disciplinary action by the SEC itself against a securities professional. On the contrary, the SEC has repeatedly interpreted the Maloney Act not to inhibit its independent inquiry into improper practices. See Shearson, Hammill & Co., Exchange Act Release No. 34-7743, 42 S.E.C. 811, 852 n.88 (Nov. 12, 1965); Lile & Co., Inc., Exchange Act Release No. 34-7644, 42 S.E.C. 664, 668 & n.13 (July 9, 1965). Indeed, the scope of sanctions that the two institutions may impose varies significantly in that the NASD's greatest sanction is merely to expel a member, revoke his registration, and bar him from association with NASD members. See Lile & Co., 42 S.E.C. at 668 n.12; 6 Loss & Seligman, supra, at 2824. As the SEC characterized the NASD's function in Lile & Co.:

> The major issues in NASD disciplinary proceedings are whether a member or a registered representative violated the Association's Rules of Fair Practice, and whether a respondent's affiliation with the association should be suspended or terminated. The NASD enforces compliance by its members not only with legal standards but also with ethical concepts applying to dealings with both the public and other professionals in the securities business. It fixes standards and controls practices of its members within such concepts as the "promotion of just and equitable principals of trade."

Lile & Co., 42 S.E.C. at 668 n.12. The SEC, in contrast has substantially more powerful authorizations, including the

right to seek injunctive relief, see, e.g., Exchange Act § 21(d)(1), 15 U.S.C. § 78(d)(1); Advisers Act § 209(d), 15 U.S.C. § 80 b-9(d), and to initiate criminal prosecution under a wide number of provisions, see e.g., Exchange Act § 32(a), 15 U.S.C. § 78ff(a); Advisers Act § 217, 15 U.S.C. § 80b-17.

In this case, the NASD charged Jones with ten violations of its Rules of Fair Practice and related statutory provisions, and following a negotiated settlement, the NASD entered an order censuring Jones, suspending him for three days, and fining him $22,500. No party appealed that order to the SEC, nor did the SEC on its own motion review it. Thus, the NASD order amounts to a final, internal NASD order sanctioning Jones for violating the NASD's established rules. And the gravity of the sanctions is the product of NASD judgment.

The SEC's action, in contrast, was a public, administrative proceeding designed not only to protect the integrity of the markets but also to vindicate the public interest as determined by an agency of government created by Congress to enforce the securities laws. While the SEC has important roles in both the NASD's proceedings and its own administrative enforcement proceedings, its roles in the two proceedings vary, as does the nature of each proceeding. The NASD's proceedings are intended to provide front-line, less formal enforcement of rules governing day-to-day operations of over-the-counter securities markets. On the other hand, the SEC administrative proceedings cover all markets and organizations and are designed to prevent and to punish more serious securities laws violations which, as the SEC determines, must be redressed in the public interest.

While the NASD and the SEC both aim at providing efficient markets with fair disclosure, protecting investors, and preserving the integrity of markets, their respective roles, while coordinated, vary in more than degree. They represent distinct interests. Congress' decision to give both the NASD and the SEC overlapping disciplinary authority reflects a considered decision to bring two separate vantage points to enforcement efforts -- one from the industry itself and the other from the regulator. Consistent with these varying, but cooperative roles, the SEC thus acts as supervisor and adjudicator of the NASD's action but as prosecutor and adjudicator in its own enforcement efforts.

The judgmental differences of the two enforcing bodies manifested themselves in this case. Before the NASD, Jones was charged with violations of NASD rules and related statutory provisions, and he was disciplined as a NASD member. Before the SEC, Jones was charged with similar and analogous statutory violations, but with additional scope. He was charged not only under the Exchange Act, but also under the Advisers Act, and he was subjected to greater discipline as well as to injunctive relief.

While the proceedings before the NASD and the SEC vary in function and scope, we grant that their objective is undoubtedly similar and arguably duplicative in some respect. Even if the duplicative aspect becomes the center of focus, however, Jones still fails with his res judicata defense because of his clear inability to establish an identity of the parties to the two proceedings. The SEC was not a party to the NASD proceeding. Its role, if any, was as potential reviewer of the NASD proceeding. But in this case, the SEC did not review the NASD's sanction. Even had it exercised the right of

review, however, as reviewer, the SEC does not become a party; its review role is an adjudicatory one.

While the SEC's role can be confused by the fact that the SEC is investigator, prosecutor, and adjudicator in any SEC initiated administrative proceeding, the various roles of the SEC are adequately separated in practice so that Jones cannot obtain support from this fact for his res judicata defense. The SEC prosecutor, i.e. its enforcement division, was never a party to the NASD proceedings and it would not, in the ordinary course, have been a party even if the SEC as adjudicator had reviewed the NASD order.

Even though for purposes of res judicata the identity of parties may be satisfied by persons in privity with parties, the privity requirement assumes that the person in privity is "so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 493 (4th Cir. 1981) (quoting Jefferson Sch. of Soc. Science v. Subversive Activities Control Bd., 331 F.2d 76, 83 (D.C. Cir. 1963)). "[P]rivity attaches only to those parties whose interest in a given lawsuit are deemed to be 'aligned.'" Comite d Apovo a los Trabajadores Agricolas v. U.S. Dep't. of Labor, 995 F.2d 510, 514 (4th Cir. 1993). In the case before us, NASD's interest in prosecuting a disciplinary action does not represent the same legal right that the SEC has in reviewing it.

Notwithstanding an inability to satisfy the essential elements of a res judicata defense, Jones appeals at bottom to a general sense of unfairness, arguing, "In no other realm of Anglo-American jurisprudence could a person be so doubly liable to the same plaintiff." While double liability for the same

conduct does, in the abstract, offend a certain sense of fairness, our system tolerates it and, at times, even requires it. An intoxicated driver who collides with another automobile may answer to the state for criminal charges for driving under the influence and to the victim for civil damages, even punitive damages. He may also answer to his employer if he was in the course of employment and even to the United States if his intoxication involved, for example, the use of prohibited drugs. Or even more analogously, we readily accept double liability imposed against a professional baseball player, first by his baseball club and then on another level by the Commissioner of Baseball. While both levels may be sanctioning the same conduct, they are serving separate interests. Thus, it is not surprising that the District of Columbia Circuit has expressly recognized the validity of simultaneous investigations of the same conduct by the SEC and the Department of Justice. See SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375-76 (D.C. Cir. 1980). Similarly, the Supreme Court has allowed the Food and Drug Administration to seek civil and then criminal penalties for the same conduct. See United States v. Kordel, 397 U.S. 1, 11 (1970); see also Hercules Carriers, Inc. v. Florida, 768 F.2d 1558, 1580 (11th Cir. 1985) (allowing relitigation by a state agency of issues already lost by another agency of the same state).

Analogously, in this case, Jones' conduct could easily have exposed him to yet further sanction. If his conduct had been sufficiently egregious, he could have been prosecuted criminally, see, e.g., Exchange Act § 32(a), 15 U.S.C. § 78ff(a); Advisers Act § 217, 15 U.S.C. § 80b-17, and if he caused damage, he could have become exposed to liability to victims. Our judicial system carefully defines, under established principles, those specific circumstances where

double liability or punishment is fair and appropriate and when it is not. While res judicata defines one of those circumstances where successive penalties are not appropriate, Jones is unable to satisfy its requirements.

B

As a variation of his res judicata defense, Jones argues that the SEC's action exceeds the SEC's statutory authority because, when enacting the Maloney Act, Congress consciously divided the securities regulatory effort between industry self-regulation and SEC regulation.

To avoid bureaucratic expansion of the SEC, Congress did indeed delegate to registered securities associations, i.e., the NASD, the day-to-day policing of securities professionals while reserving to the SEC the residual policing of the "submarginal fringe which recognizes no sanctions save those of the criminal law and of dealing with those problems of regulation with which the industry, as organized under the act, finds itself unsuited or unable to deal." Report of the Special Study of Securities Markets of the Security and Exchange Commission, H.R. Doc. No. 88-95, pt. 4, at 606 (1963) (comments of Senator Maloney). While Congress placed a right to review NASD action in the SEC, it provided that the SEC could only affirm, modify, reduce or cancel the NASD's sanctions; it could not increase them. See id.; see also Mason, Moran & Co., Exchange Act Release No. 34-4832, 35 S.E.C. 84 n.25 (April 23, 1953) ("This Commission is not authorized by statute ... to increase the sanctions imposed by [the NASD]"); 6 Loss & Seligman, supra, at 2746 n.220. Jones argues that allowing the SEC to impose a more severe sanction than that imposed by the NASD would authorized the SEC to circumvent the Maloney Act. If the

SEC were to find an NASD disciplinary sanction too lenient, its remedy, Jones argues, would be to remand the proceeding to the NASD for further proceedings. See 15 U.S.C. § 78s(e). In the extreme, Jones acknowledges, the SEC could set aside the NASD's sanction and open its own investigation, but it did not follow that procedure in this case.

While Jones is unable to point to any statutory provision, statutory interpretation, or legislative history that makes NASD-initiated discipline and SEC-initiated discipline mutually exclusive, he argues that if the SEC allows NASD disciplinary action to stand, it should not then be allowed to initiate a duplicate proceeding. As he summarizes:

> In enacting the Maloney Act, Congress could hardly have contemplated that the SEC would get into the business of approving NASD sanctions and then imposing additional sanctions of its own. That would be more extreme than merely increasing the NASD sanctions -- a procedure flatly prohibited by the Act.

In the absence of legal support for this proposition, Jones argues that because Congress divided enforcement responsibilities between the NASD and the SEC, we may infer that both cannot initiate discipline for the same conduct. Implicit in this argument is the invitation that we find the functions and interests of the NASD and the SEC to be coterminous or even, in some aspect, in conflict. We could not make such a finding.

As we have already observed, the NASD is a private non-profit corporation regulated as a registered securities association. Under the Maloney Act, the NASD is authorized to regulate itself by prohibiting and preventing fraud and

unethical conduct by its members and by promoting in them professionalism and technical proficiency, much as would any association of professionals seeking to better itself and instill confidence in the public. While its self-regulating powers are supervised by the SEC, which is essentially given a veto power over NASD disciplinary action, that review power does not convert the NASD's interest to the same interest as that of the regulating agency. Even though the SEC's role in reviewing NASD action is essentially one of approval or disapproval, in its other roles, the SEC is given a larger responsibility as the government agency charged with executing the broad array of securities enactments. In short, the NASD's interest is that of a professional association charged with regulating itself, and the interest of the SEC is that of a policing agency that reviews NASD action and executes, in the public interest, the securities laws of the United States. There is nothing inherent in the SEC's dual role that suggests that the SEC's various functions are mutually exclusive. By giving the SEC a broad range of responsibilities and enforcement rights, Congress indicates just the contrary. The diverse statutory provisions authorizing SEC action confirm this conclusion.

Notwithstanding the SEC's broad authority, it nevertheless affirms that, as a matter of policy, it does not impose sanctions on NASD members when it determines that NASD sanctions are sufficient and that it initiates action on its own only when doing so is necessary in the "public interest."

In summary, the SEC has "pervasive oversight authority" over the NASD's disciplinary proceedings to ensure that they are conducted fairly, see Austin Mun. Sec., Inc. v. NASD, 757 F.2d 676, 690 (5th Cir. 1985), but it also has separate and distinct authority to execute the securities laws when it

determines that the public interest requires it. We can find no provision that makes these roles mutually exclusive. Accordingly, we hold that the Maloney Act's limitations of the SEC's review over NASD disciplinary action do not constitute limitations on the SEC's other enforcement rights and obligations.

C

Jones' final argument in support of his claim of improper double liability is that the Fifth Amendment's Double Jeopardy Clause prohibits both penalization by the NASD and penalization by the SEC for the same conduct. When he acknowledges that both of the sanctions are denominated "remedial," he argues that in fact they constitute penalties within the meaning of the Double Jeopardy Clause. See United States v. Halper, 490 U.S. 435, 447-50 (1989). He asserts that the $22,500 fine imposed by the NASD for failure to maintain $5,000 in net capital "can only be punitive, since the penalty is four times" the capital requirement. And he argues that the SEC's "banishment of Mr. Jones from the securities business is hardly remedial," explaining, "[i]f he is not associated with [the business] for two and one-half years, the firm -- and his sole source of income -- will cease to exist. Such a 'death penalty' can only serve as retribution."

The government argues that the double jeopardy clause is not applicable (1) because the NASD is a private party and not a governmental agent and (2) because the SEC's sanctions are remedial rather than penal. We agree with the SEC on both points.

The Double Jeopardy Clause, which provides "nor shall any person be subject for the same offense to be twice put in

jeopardy of life or limb," U.S. Const. amend. V, prohibits successive governmental criminal prosecutions and successive governmental punishments for the same conduct. See United States v. Hatfield, 108 F.3d 67, 68 (4th Cir. 1997). While the NASD is a closely regulated corporation, it is not a governmental agency, but rather a private corporation organized under the laws of Delaware. As such, it is highly questionable whether its disciplinary action of members, even if it is considered to be a quasi-public corporation, can implicate the Double Jeopardy Clause. As Judge Friendly has aptly observed, the Clause restricts conduct of the "government in the narrowest sense," and "[n]o private body, however close its affiliation with the government, can ... subject a person" to double jeopardy. United States v. Solomon, 509 F.2d 863, 867 (2d Cir. 1975).

More clearly, however, Jones has not twice been subjected to penalties for the same conduct in the sense prescribed by the Double Jeopardy Clause. While the civil or remedial label imposed by the SEC on its sanctions of Jones is not necessarily determinative, if a sanction is so designated, Jones has the burden of presenting the "clearest proof ... that the proceeding is not civil but criminal in nature." Hatfield, 108 F.3d at 70 (internal quotation omitted). To determine whether a sanction is civil or criminal, we look to (1) whether it is designated to be remedial and (2) whether the remedy provided, even if so designated, "is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty." One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972); see also United States v. Ursery, 116 S. Ct. 2135, 2147 (1996); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984).

In this case, Jones has not carried the burden of demonstrating with the clearest proof that his suspension by the SEC was disproportionate to the benefits received by the government in protecting the public against the types of violations it found Jones to have committed. His conduct evidenced a serious disregard for investor protections and well could have led to substantial investor losses. That investors did not sustain losses does not alter the nature of the violations, nor does it reduce the serious risks that the SEC's suspension of Jones sought to correct. See Blaise D'Antoni & Assoc. v. SEC, 289 F.2d 276, 277 (5th Cir. 1961) (order revoking broker-dealer registration "is not punitive; it is not a penalty imposed on the broker ... but a means to protect the public interest" (citing Pierce v. SEC, 239 F.2d 160, 163 (9th Cir. 1956) (denial of broker-dealer registration is a means to protect the public interest, and "is not to be regarded as a penalty imposed on the broker")). Accordingly, we conclude that the Double Jeopardy Clause does not bar the SEC's order in this case.

III

Jones also challenges the sufficiency of the evidence to support the finding of scienter and the illegal conduct related to it, and he contends that his 30-month suspension was "unduly harsh." We find no merit to either argument.

Jones argues that in connection with the Sidbury Offering, he honored the escrow account requirements by following the advice of counsel. He asserts that he never believed that anything he did was illegal, and he points to his own testimonial explanations to support that position. He overlooks, however, the testimony to the contrary that was given by his attorney, L. Bruce McDaniel. McDaniel testified

that he advised Jones to set up a separate escrow agreement with the bank under which escrow proceeds would remain beyond Jones' control. McDaniel explained that the purpose for his recommendation was to shield the offering proceeds from self-dealing and to enable Jones & Ward Securities to continue in operation with the lower $5,000 capital requirement. Jones concedes that he did not set up such an escrow account, but he maintains that he nevertheless honored all escrow requirements, about which the offering states:

> The first $192,000 of sales proceeds will be escrowed with United Carolina Bank of Wilmington, North Carolina. After $192,000 in stock has been sold, those escrowed funds will be released to the company. If less than $192,000 of stock is sold, all escrowed funds will be returned to subscribers, with interest.

(Emphasis added). The evidence shows that in July 1989 Jones withdrew $32,410 from the escrow account when it contained only $108,000. Jones argues, however, that he was not violating the offering provision because he had already obtained agreements from investors to purchase more than $192,000 worth of shares. Subscription agreements, however, do not equate to "proceeds" or "funds" as referred to in the offering.

In addition to handling the account contrary to the offering and the advice of counsel, Jones refused to follow the advice of his counsel when extending guarantees to certain investors in May 1989 when the offering was getting "a little sticky." He also refused to follow counsel's advice when he extended the offering beyond the closing date without again starting from scratch. And finally, Jones refused to follow the advice of counsel in using the proceeds of both the Sidbury and OVP

Offerings for purposes other than specifically stated in the offerings.

As the SEC found, Jones "chose to disregard the terms of the offering materials and the advice of counsel. We think it clear that he acted with scienter." We agree that the SEC had evidence from which to make that finding. We are not in a position to make a contrary factual finding; rather, we must accept the SEC's findings when they are supported by substantial evidence. See Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

In arguing that the SEC's sanction was "unduly harsh," Jones argues that no investors suffered any loss and that no party other than the NASD or the SEC ever complained about his conduct. He adds that he "did not embezzle, divert funds, or otherwise wrongfully profit from any of these activities" and he continues to maintain that he believed that "he had done nothing wrong." While Jones did in fact make good the losses to his investors, he fails to realize, even yet, that he misused investors' funds in the first place; that he treated investors differently; and that he subjected investors' funds to undisclosed risks, misleading them by what he promised he would do with their money. That no investor's money was actually lost is not the measure of his wrongdoing. Jones willfully violated important rules of underwriting designed to protect investors. And if it were established that Jones continued to believe that these rules were sufficiently unimportant to follow in the future, the SEC would be justified in suspending him more permanently. With the evidence found, it suspended him only for a limited period. That sanction not only protects the investing public but clarifies to Jones that the provisions he violated cannot be

relegated in his mind merely to obstructive operating requirements.

The public interest demands enforcement and compliance with the rules for fair disclosure, adequate operating capital, recordkeeping, and reporting in connection with securities offerings. We believe that the SEC acted well within the discretion conferred on it in sanctioning violations of the securities laws by the suspensions imposed in this case. See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185-86 (1973) (holding that an agency's choice of sanction should be overturned only if "unwarranted in law or ... without justification in fact"); Svalberg v. SEC, 876 F.2d 181, 185 (D.C. Cir. 1989) ("[A] court should not second-guess the judgment of the Commission in connection with the imposition of sanction, unless the SEC has acted contrary to law, without basis in fact or in abuse of discretion.").

Accordingly, we affirm the SEC's order of October 10, 1995.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed August 12, 1997
No. 95-3119
3-8037

IVAN D. JONES, JR.

Petitioner

v.

SECURITIES & EXCHANGE COMMISSION

Respondent

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The petitioner's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

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Supreme Court, U.S.
FILED
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No. 97-1165

In the Supreme Court of the United States

OCTOBER TERM, 1997

IVAN D. JONES, JR., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether a disciplinary action against petitioner by the National Association of Securities Dealers, Inc. (NASD) for certain conduct precludes the Securities and Exchange Commission (SEC) from bringing an administrative action against petitioner for securities law violations arising out of the same conduct.

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B27) is reported at 115 F.3d 1173. The opinion of the Securities and Exchange Commission (Pet. App. A1-A24) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1997. A petition for rehearing was denied on August 12, 1997. Pet. App. B28-B29. The petition for a writ of certiorari was filed on November 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Securities Exchange Act of 1934 (Exchange Act) and the Investment Advisers Act of 1940 (Advisers Act) grant the Securities and Exchange Commission (SEC) broad authority to institute disciplinary proceedings against broker-dealers, investment advisers, and persons associated with those market professionals. 15 U.S.C. 78o(b)(4) and (6), 80b-3(e) and (f). In 1938, Congress enacted the Securities Exchange Act Amendments of 1938 (known as the Maloney Act) to allow for the registration with the Commission of "self-regulatory" associations of brokers and dealers. 15 U.S.C. 78o-3, 78s. The National Association of Securities Dealers, Inc. (NASD), "which is a private, nonprofit corporation organized under the laws of Delaware," is the only association registered under the Maloney Act. Pet. App. B13; see also *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 700-701 n.6 (1975).

As a registered national securities association, the NASD has the authority to regulate its members to ensure compliance with certain of the federal securities laws and with the NASD's own rules, which must be designed, among other things, to "promote just and equitable principles of trade." 15 U.S.C. 78o-3(a) and (b). The NASD may bring disciplinary proceedings against its members and persons associated with members for certain violations of the securities laws. 15 U.S.C. 78o-3(b)(7) and (h). A final disciplinary sanction order by the NASD is reviewable by the SEC, which may affirm, modify, or set aside the sanction imposed by the NASD, or remand for further proceedings. 15 U.S.C. 78s(d)(2), (e)(1), and (e)(2).

2. Petitioner was an officer and director of Akers and Jones Securities, Inc., a securities brokerage firm. Beginning in 1989, Akers and Jones Securities underwrote an offering of common stock by Sidbury Land Company. Contrary to the representations in the offering circular, petitioner failed to deposit subscribers' funds in a bank-controlled escrow account; prematurely withdrew subscribers' funds before the closing date of the offering; used subscribers' funds for purposes not specified in the offering circular; failed to return investor funds or distribute a revised circular when conditions specified in the offering were not met; and improperly offered prospective buyers a guarantee against loss. Pet. App. B3-B6.[1]

Also beginning in 1989, Akers and Jones Securities began operating with net capital deficiencies and failing to report those deficiencies, in violation of the securities laws. Pet. App. B7-B8. The firm also failed to maintain blotters of securities transactions and ledgers reflecting the firm's financial condition, and failed to file certain quarterly and annual financial reports, as well as other reports, with the SEC. Pet. App. B7-B8.

The NASD subsequently brought disciplinary proceedings against petitioner and his brokerage firm for fraud and for failing to maintain adequate net capital

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[1] Petitioner also failed to comply with the terms of an offering of securities in the form of partnership interests in One Virginia Partners, which petitioner marketed through his investment adviser firm, Investment/Timing Systems. As with the Sidbury offering, petitioner failed to deposit the offering proceeds in an escrow account as required by the offering materials. He also disbursed partners' funds for purposes not specified in the partnership agreement without obtaining the partners' consent. Pet. App. B6.

and adequate books and records. In 1992, under a settlement with the NASD, petitioner agreed to a censure, a suspension from association with any NASD member for three business days, a requirement that he requalify as a securities industry professional, and a $22,500 fine. Pet. App. B8.

In 1993, the SEC instituted administrative proceedings against petitioner based on the same conduct that was the subject of the NASD proceeding. After a hearing, an administrative law judge (ALJ) found that petitioner engaged in violations of antifraud, net capital, books and records, and reporting provisions of the securities laws. The ALJ suspended petitioner from association with any broker-dealer or investment adviser for one year and barred him from thereafter associating in a proprietary, supervisory, or managerial capacity, with the right to reapply after 18 months. The ALJ also censured petitioner and entered an order directing him to cease and desist from future violations. Pet. App. B9. The SEC sustained the ALJ's findings and the sanctions imposed. *Id.* at A1-A24.

3. The court of appeals affirmed. Pet. App. B1-B27. It rejected petitioner's argument that, under principles of res judicata, the NASD's disciplinary proceeding precluded the Commission's administrative proceeding. *Id.* at B10-B19. The court found that petitioner did not establish an identity of cause of action and parties between the two actions. The court explained (*id.* at B12) that "the NASD's enforcement action is not the same cause of action as the SEC's own later enforcement action," because the SEC's enforcement authority is broader.

The court further reasoned that "[t]he SEC was not a party to the NASD proceeding," Pet. App. B16,

or in privity with a party, *id.* at B17. The court explained that its conclusion was not altered by the fact that the Maloney Act, 15 U.S.C. 78s(d), authorizes the SEC to review final NASD disciplinary orders:

> [The SEC's] role, if any, was as potential reviewer of the NASD proceeding. But in this case, the SEC did not review the NASD's sanction. Even had it exercised the right of review, however, as reviewer, the SEC does not become a party; its role is an adjudicatory one.

Pet. App. B16-B17.

The court similarly rejected petitioner's argument that Congress intended that the NASD's disciplinary authority over its members under the Maloney Act would preclude SEC enforcement authority to sanction the same conduct. Pet. App. B19-B22. The court reasoned that petitioner could not point to "any statutory provision, statutory interpretation, or legislative history that makes NASD-initiated discipline and the SEC-initiated discipline mutually exclusive." *Id.* at B20. The court further explained that although the SEC retains substantial oversight authority over NASD disciplinary proceedings, the SEC "also has separate and distinct authority to execute the securities law when it determines that the public interest requires it." *Id.* at B21-B22.[2]

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[2] The court also held (Pet. App. B22-B24) that the SEC's sanctions did not violate the Double Jeopardy Clause. Petitioner does not challenge that ruling in this Court.

ARGUMENT

Petitioner renews his contention (Pet. 4-11) that the NASD's exercise of authority to discipline its members under the Maloney Act precludes subsequent SEC proceedings based on the same conduct. We are aware of no decision, however, that has accepted that argument. In any event, the court of appeals properly rejected it, finding "no statutory, regulatory, or historical reference to support [petitioner's] argument that NASD discipline of its members was intended to preclude * * * disciplinary action by the SEC itself against a securities professional." Pet. App. B14. Accordingly, the court of appeals correctly held that the SEC's enforcement action in this case was not barred by the earlier proceeding by the NASD.

1. Petitioner contends (Pet. 4-8) that the SEC's proceeding circumvents the terms of the Maloney Act that grant the SEC the power to affirm, modify, or set aside a NASD sanction, 15 U.S.C. 78s(e)(1), but not to increase it. The SEC's role as adjudicator over NASD proceedings, however, does not limit the SEC's separate statutory authority to impose sanctions when it functions as a prosecutor in its own proceeding. As the court of appeals explained, "the NASD's interest is that of a professional association charged with regulating itself, and the interest of the SEC is that of a policing agency that reviews NASD action and executes, in the public interest, the securities laws of the United States." Pet. App. B21. Thus, the court continued, "[t]here is nothing inherent in the SEC's dual role that suggests that the SEC's various functions are mutually exclusive. By giving the SEC a broad range of responsibilities and enforce-

ment rights, Congress indicates just the contrary. The diverse statutory provisions authorizing SEC action confirm this conclusion." *Ibid.* See 15 U.S.C. 78o(b)(4) and (6), 80b-3(e) and (f). Accordingly, the court below correctly held that "the Maloney Act's limitations of the SEC's review over NASD disciplinary action do not constitute limitations of the SEC's other enforcement rights and obligations." Pet. App. B22; see also *id.* at B14 (noting that "the SEC has repeatedly interpreted the Maloney Act not to inhibit its independent inquiry into improper practices," and citing cases).

Petitioner also errs in suggesting (Pet. 4-5) that the SEC may not regulate in areas subject to enforcement by the NASD. Congress expressly granted the NASD and the SEC overlapping responsibility to bring disciplinary proceedings against securities professionals for violations of the Exchange Act or rules and regulations thereunder, see 15 U.S.C. 78o-3(b)(4), (6) and (7). Moreover, Congress has granted the SEC a broader range of remedies than are available to the NASD. Thus, while "the NASD's greatest sanction is merely to expel a member, revoke his registration, and bar him from association with NASD members," Pet. App. B14, the SEC may ban a person from registering as, or from associating with any, broker-dealer *or* investment adviser, and may issue a cease and desist order, 15 U.S.C. 78u-3. Petitioner points to nothing in the Maloney Act that suggests that a person is immune from those statutory remedies and penalties if he is first subject to disciplinary sanc-

tions imposed by a self-regulatory national securities association.[3]

2. Petitioner also contends (Pet. 8-11) that the court of appeals improperly rejected his defense of claim preclusion, or res judicata, under which "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). Accord *Richards* v. *Jefferson County*, 116 S. Ct. 1761, 1764-1765 (1996); *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989). The court of appeals properly rejected that defense on the grounds that the SEC was neither a party to, nor in privity with a party to, the NASD proceeding, and that the two proceedings are not based on the same cause of action. Pet. App. B12-B19.

a. The court of appeals concluded that the SEC was not a party, or in privity with a party, to the NASD proceeding. Pet. App. B16-B19. In arguing to the contrary, petitioner contends that the NASD and the SEC are "two wings of a single federal agency," Pet. 11, and that there is privity between the NASD and the SEC because their officers represent "the same government," Pet. 8 (quoting *Sunshine An-*

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[3] Petitioner also relies (Pet. 4-5) on suggestions in the legislative history of the Maloney Act that authorizing the NASD to bring proceedings would reduce the number of enforcement proceedings initiated by the SEC. Nothing in that history, however, indicates that Congress intended to preclude the SEC from bringing its own proceedings when it believes that further sanctions are appropriate. See also Pet. App. B21 (noting that "as a matter of policy, [the SEC] does not impose sanctions on NASD members when it determines that NASD sanctions are sufficient[,] and * * * it initiates action on its own only when doing so is necessary in the 'public interest'").

thracite Coal Co. v. *Adkins*, 310 U.S. 381, 402 (1940)). That is not correct.

The NASD is a private corporation, not a government agency. Pet. App. B13, B20. Moreover, while the NASD is subject to extensive oversight by the SEC, that oversight does not transform it into the SEC.[4] As the court of appeals correctly explained, "[t]he SEC prosecutor, *i.e.* its enforcement division, was never a party to the NASD proceeding and it would not, in the ordinary course, have been a party even if the SEC as adjudicator had reviewed the NASD order." *Id.* at B17; see also *ibid.* ("NASD's interest in prosecuting a disciplinary action does not represent the same legal right that the SEC has in reviewing it.").

b. Petitioner also argues that the NASD and SEC proceedings involve the identical cause of action because the SEC has acknowledged that the two proceedings were "based on substantially the same allegations." See Pet. 10 (quoting Pet. App. A23 n.36). Even assuming that the SEC could be considered the

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[4] Petitioner cites no decision holding that the NASD should be treated as the SEC for all purposes, or even for purposes of applying preclusion principles. The decisions petitioner relies upon (Pet. 5) involve whether the NASD or its officials are immune from suit, *Austin Mun. Sec., Inc.* v. *National Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 689-692 (5th Cir. 1985); *Mandelbaum* v. *New York Mercantile Exch.*, 894 F. Supp. 676, 678-682 (S.D.N.Y. 1995); *Bruan, Gordon & Co.* v. *Hellmers*, 502 F. Supp. 897, 902-903 (S.D.N.Y. 1980); whether such officials are akin to federal officials for purpose of jurisdiction, *Bruan, Gordon*, 502 F. Supp. at 901-902; or whether a plaintiff may claim that NASD rules tortiously interfered with private contracts, *Harwell* v. *Growth Programs, Inc.*, 315 F. Supp. 1184, 1191 (W.D. Tex. 1970), rev'd, 451 F.2d 240 (5th Cir. 1971), cert. denied, 409 U.S. 876 (1972).

"plaintiff" in the NASD's disciplinary proceeding, however, it is well established "that claim preclusion generally does not apply where '[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts.'" *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985) (quoting Restatement (Second) of Judgments § 26(1)(c) (1982)); see also 18 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4412, at 94 (1981) ("Matters that can be advanced only before an administrative agency ordinarily do not form part of a single claim with matters that can be advanced only before another agency or a court.").

As the court of appeals explained, the SEC proceeding involved claims and forms of relief that could not have been advanced by the NASD. Pet. App. B16. For example, the SEC charged petitioner with aiding and abetting violations of antifraud provisions of the Investment Advisers Act of 1940, 15 U.S.C. 80b-6(1) and 6(2), a matter outside the NASD's jurisdiction. See 15 U.S.C. 78o-3(b)(7) (defining violations for which members may be disciplined). The SEC also imposed sanctions on petitioner, such as a suspension from association with any investment adviser, and a cease and desist order, that were not available to the NASD. Pet. App. B15-B16. It would be inappropriate to preclude the SEC from carrying out its broad statutory enforcement responsibilities simply because the NASD, acting under different and limited statutory authority, first brought a disciplinary proceeding based on the same conduct. Accordingly, the

court of appeals properly held that the SEC's administrative proceeding was not barred by principles of res judicata.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1998